

DECISION



A. Gallagher
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

8356

FILE: B-191877

DATE: November 15, 1978

MATTER OF: INTACA

DIGEST:

1. Where agency believes individual evaluators' scoresheets are exempt from disclosure under Freedom of Information Act (FOIA), protester's recourse is to pursue disclosure remedy under FOIA. GAO has no authority under FOIA to determine what information Government agencies must disclose.
2. In considering objections to technical evaluation of proposals, GAO function is not to evaluate proposals, but to examine record and consider whether agency's determinations have been clearly shown to have no reasonable basis.
3. Where RFP stated requirements for technical assistance contract in general terms, objections to technical evaluation--premised essentially on protester's substitution of its judgment for agency's as to relative merits of different technical approaches--do not establish that evaluation results clearly have no reasonable basis.
4. Considering "legal background" as undisclosed technical evaluation subcriterion is not improper where RFP contained evaluation criterion dealing with offeror experience in developing national and regional programs, and RFP specifications indicate legal considerations are pertinent to contract work--drafting sections of Forest Service Manual.
5. Allegation that no negotiations were conducted is without merit. Agency's request for and receipt of "clarifications" involving material changes in offerors' proposals constitute discussions, and discussions are synonymous with negotiations.

6. Allegation after award that protester should not have had to furnish clarifications of its proposal requested by agency during discussions is untimely. Protester was on constructive notice of basis for protest at closing date for receipt of best and final offers and did not protest within 10 working days thereafter.
7. Contentions of improper actions by agency technical evaluators in evaluation and scoring of revised technical proposals are wholly speculative where written record does not clearly demonstrate existence of unfair or improper conduct.
8. Where firm-fixed-price proposals are submitted and price negotiated is based on adequate price competition, there is no longer any requirement that agency conduct cost analysis of cost or pricing data submitted with proposals.

Table of Contents

	Page
I. Background	4
II. Procedural Issues	6
III. Scope of GAO Review	7
IV. Specific Objections to Technical Evaluation	9
V. Undisclosed Evaluation Subcriterion .	12
VI. Conduct of Discussions	15
VII. Revised Technical Scores	16
VIII. Price Evaluation	18
IX. Conclusion	20

INTASA has protested the award of a contract to the Center for Natural Areas (CNA) by the U. S. Forest Service, Department of Agriculture, under request for proposals (RFP) No. 4-78. Mainly, the protester challenges the technical and price evaluations conducted by the Forest Service.

I. Background

The RFP was issued January 6, 1978, and contemplated the award of a firm-fixed-price contract for a "Land Management Planning Manual." Clause 10 of the RFP, "Award of Contract," as amended, provided in pertinent part:

"Evaluation of Proposals.

"The proposals will be ranked on the basis of total scores from the technical and price evaluation.

"The technical portion of the proposals will be given a subjective review and analysis by a Contract Review Board, who will not have access to the price proposals. The Board will rate each technical proposal on the basis of its technical merit. Technical proposals will be rated on the factors listed below. A point system will be used. The maximum possible point values for each factor are:

"Criteria

Maximum Points

"1. Technical Proposal

- | | |
|--|----|
| "a. Experience with development of broad scale national and regional programs (WRC Level B, EPA 208, etc.) | 10 |
|--|----|

- "b. Familiarity with land management planning concepts and processes as are applicable to development of Land Management Plans for use in the Forest Service. 10
- "c. Professional qualifications of personnel and availability of such personnel. 10
- "d. Proposal for accomplishing required tasks and providing final products. 30
- "e. Qualifications of the bidder including business stability. 10
- "2. Price 30

"The lowest priced proposal of those proposals within the technically acceptable range will be assigned the maximum rating of 30 points. Each of the remaining proposals will be divided into the lowest price, yielding an index valued between 0 and 1. These indexes will be multiplied by the maximum pricing weight of 30, resulting in prorated ratings for each price proposal."

Seven proposals were received and evaluated, with the protester and CNA ranked as follows:

	<u>Price</u>	<u>Technical Score</u>	<u>Price Score</u>	<u>Total Score</u>	<u>Rank</u>
CNA	\$99,852	51.8	25.83	77.63	2
INTASA	\$167,731	55.4	15.38	70.78	3

The total scores ranged from a low of 50.56 to a high of 77.80, while the range in offered prices was \$85,985 to \$212,123. The Government estimate for the work was \$101,027.

The Forest Service decided to conduct discussions with all seven offerors. After discussions, best and final offers were submitted and evaluated:

	<u>Price</u>	<u>Technical Score</u>	<u>Price Score</u>	<u>Total Score</u>	<u>Rank</u>
CNA	\$94,464.33	56.6	30	86.6	1
INTASA	\$122,988.45	56.4	23.04	79.44	2

The total scores of the best and final offers ranged from 54.18 to CNA's 86.6, while the range in prices was from CNA's low of \$94,464.33 to a high of \$179,578. Award was made to CNA in April 1978, and INTASA then protested.

II. Procedural Issues

INTASA has repeatedly requested that it be furnished with copies of the individual evaluation worksheets prepared by the Forest Service's technical evaluators. The contracting office's letter to the protester dated April 27, 1978, furnished some data concerning the evaluation but refused to release this information, stating that it was being withheld pursuant to exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (1976). INTASA protests this decision.

Our Office has no authority under FOIA to determine what information must be disclosed by Government agencies. While information in an agency report which the agency believes is exempt from disclosure under FOIA will be considered by our Office in reaching a decision on the merits of the protest, we will not disclose it outside the Government. The protester's recourse in such situations is to pursue its disclosure remedy under the procedures provided by FOIA. See National Motors Corporation et al., B-189933, June 7, 1978, 78-1 CPD 416; University of New Orleans, B-184194, May 26, 1978, 78-1 CPD 401; Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 990-991 (1976), 76-1 CPD 240.

INTASA has also complained that the contracting officer attempted to persuade it to drop its protest by asking what it had to gain from the protest. Assuming this to be true, we are in any event unaware of anything in Federal Procurement Regulations (FPR) § 1-2.407-8 ("Protests against award") (2d ed., FPR amend. 139, January 1975) which precluded the contracting officer from taking such action.

Further, INTASA complains of a slow response by the contracting officer to its requests for information, since it requested a copy of CNA's proposal on April 17, 1978, but did not receive it until May 1, 1978. We are unaware of any law or regulation which was contravened in this regard, and again see no impropriety in the contracting officer's actions.

Finally, the protester alleges that the contracting officer rushed to execute the contract with CNA knowing that the protest process would take so long that INTASA would be precluded from obtaining effective relief. This unsubstantiated allegation is mooted by the fact that this decision denies INTASA's protest.

III. Scope of GAO Review

INTASA has requested that our Office conduct an "independent technical review" of the proposals. The protester believes that while it has stated its case so that a reasonable professional could readily see the difference between its proposal and CNA's, an independent technical review is the only way to resolve the matter.

We believe these statements reflect a misunderstanding by the protester of the scope of our review of issues concerning the technical evaluation of proposals in a negotiated procurement. The following statement from Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 382 (1975), 75-2 CPD 232, is pertinent:

"JRL has indicated that a 'thorough technical review' by our Office of the points at issue is necessary. At the outset, it is important to note that our Office has never taken the position that we will substitute our judgment for the agency's--by conducting technical evaluations of proposals and rendering determinations as to their acceptability--simply because a protest against the technical evaluation has been filed. On the contrary, our decisions have repeatedly emphasized that these functions are primarily the responsibility of the contracting agency, whose judgment will not be disturbed by our Office unless clearly shown to be without a reasonable basis. See, in this regard, Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61; 52 Comp. Gen. 393, 399-400 (1972); 52 id. 382, 385 (1972)."

As indicated in Julie Research Laboratories and many other decisions of our Office, our function is not to evaluate the proposals de novo and make our own determinations as to their acceptability or relative merits. Rather, we apply a standard of review to determinations which are the responsibility of, and which have already been arrived at by, the contracting agency. See Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458, and decisions cited therein. In applying the standard of review we look to the written record submitted by the parties involved. Houston Films, Inc. (Reconsideration), B-184402, June 16, 1976, 76-1 CPD 380. Since the agency officials are accorded a considerable range of judgment and discretion in carrying out the evaluation, their determinations are entitled to great weight. Joseph Legat Architects, supra; Olin Corporation, Energy Systems Operations, B-187311,

January 27, 1977, 77-1 CPD 68. The fact that the protester disagrees with the agency's evaluation does not in itself establish that the evaluation clearly had no reasonable basis. Houston Films, Inc., supra. In addition,

"* * * [W]e will not substitute our judgment for that of the cognizant contracting officials by making an independent judgment as to the precise numerical scores which should have been assigned each proposal * * *."

PRC Computer Center, Inc. et al., 55 Comp. Gen. 60, 68-69 (1975), 75-2 CPD 35.

The same principle applies with respect to the selection of which of several proposals is most advantageous to the Government. Source selection is the responsibility of the contracting agency. Our function is not to make the selection, but to decide whether the agency's selection has been shown to be legally objectionable. See B-178220, December 10, 1973; EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338.

IV. Specific Objections to Technical Evaluation

The protester has raised a number of objections to the technical evaluation which may be summarized, along with the Forest Service's responses, as follows:

Protester: The RFP (page 12, clause 2.(dd)) required that the technical proposal contain a detailed plan covering, among other things, the mechanism for cooperation between the task force and other Forest Service personnel in developing manual material and the technical approach for developing the content of the manual sections. In other words, the RFP asked for a detailed plan which could be implemented immediately with only minor modifications. CNA's technical proposal (page 4.1) stated that its "work plan" emphasized interaction with Forest Service personnel and indicated that it was too early to identify how this interaction would be integrated with development of the products to be provided under the contract. CNA indicated that it would develop a work plan under the contract, whereas this was what the RFP called for in the proposals.

Forest Service:

"The difference in approach by CNA and INTASA is a crucial point. The overall technical approach proposed by CNA involved a close working relationship between the contractor and the Forest Service at all levels. INTASA views the contractor's role much differently. INTASA proposed 3 or 4 day workshops where they (INTASA) are in charge, present a program, obtain feedback, and prepare a final product. The Forest Service sees the contractor in a supportive role. Although INTASA understands the problem, their approach is less desirable." (Emphasis in original.)

P: CNA's approach is not sensitive to weaknesses within the Forest Service, whereas INTASA meticulously spelled out its approach so as to maximize the effectiveness of an "outsider" working within a Federal agency.

FS:

"The contract requires the contractor to assist in the resolution of certain issues (i.e., information systems, analysis requirements, linkages, planning production). He is not required to identify and resolve all issues relating to implementation of the * * * regulations; the Forest Service itself will deal with these issues."

P: CNA's estimate of 28.5 man-days to document cross-references in material is not explained, nor does CNA recognize the need for an incremental approach to manual development. INTASA's proposed 6 hours of work on cross-referencing is more reasonable.

FS: INTASA's proposed 6 hours is seriously questionable. More work is required than could be provided in 6 hours.

P: CNA's proposal does not explicitly address how testing of concepts will be conducted, while INTASA's does.

FS: While INTASA's proposed procedure (testing workshops) is not "wrong," the question is whether this is the best way to handle the problem. Concepts should be tested in an operational setting.

P: CNA's proposal is less than clear in regard to its time allocation table, and as to how the seven-person CNA team will function, and in other areas.

FS: The Forest Service is satisfied that CNA satisfactorily spelled out its role in this effort.

P: An approach providing effective internal review is essential and was proposed by INTASA, whereas CNA proposed less effective outside review.

FS: Both internal and external review are needed. INTASA covered internal review but did not recommend any external review. Internal acceptance of manual material is a problem with which the Forest Service must deal.

P: The CNA proposal contains much superfluous material. For example, if the Forest Service considered letters of recommendation to be desirable, it should have so indicated in the RFP evaluation criteria.

FS: Proposals were not evaluated on the basis of the number of pages. Letters of commendation were considered under the evaluation criterion regarding experience in development of broad scale national and regional programs.

P: CNA's proposal mysteriously indicates that it now has a sole-source contract to review documents to be produced under the current contract.

FS: This assumption on the protester's part is not relevant to the present protest.

CNA: The referenced sole-source contract does not involve review of documents developed under the protested contract.

P: CNA's style of proposal writing makes it sometimes difficult to understand CNA's intention.

FS: As the protester itself notes, proposal writing style is a highly personalized affair.

The Forest Service's view is that the protest in this respect is based essentially on a biased and self-serving evaluation by INTASA of its own and CNA's proposals. The agency indicates that the protester, reading into the RFP its own interpretation of the Government's intention, is in effect attempting to substitute its own judgment for that of the Forest Service technical evaluators. We believe this view is supported by the protester's own statements which recognize that the RFP requirements were stated in general terms. As INTASA states,

"Details of the problem for which the Forest Service sought outside technical assistance are not obvious from reading RFP-4-78. * * * [T]he primary message in the RFP is that the Government wants to hire 'professional time' from outside contractors; product and interaction requirements are only vaguely described."

Having reviewed the protester's contentions and the Forest Service's responses, we see no grounds to object to the evaluation. The fact that the protester disagrees with the conclusions reached by the agency is not enough to show that those conclusions clearly have no reasonable basis.

V. Undisclosed Evaluation Subcriterion

INTASA, in its May 5, 1978, letter of protest, also contended that CNA's key investigators are not eminently qualified because their background is legal,

whereas INTASA's personnel have qualifications relating to systems analysis and planning. The Forest Service's report answered:

"We strongly emphasize that legal authority and policy support is an extremely important aspect of the required experience. It is obvious that CNA does, in fact, have more experience in the area where experience is vital to the success of the completion of contract requirements."

The protester comments that a technical evaluation must be conducted in strict conformity with the RFP evaluation criteria, and notes that nowhere in the RFP did the Forest Service state that legal background would be an evaluation criterion. INTASA believes this after-the-fact adoption of a new evaluation criterion is in violation of applicable procurement regulations. Further, INTASA points out that the Forest Service has revealed that it applied three undisclosed subcriteria under the evaluation criterion, "Experience with development of broad scale national and regional programs." These were (1) experience in methodology development; (2) experience related to direction and guidance, and (3) examples of performance in action case studies. The protester believes these three subcriteria relate to policy and planning, not to legal background.

The rule in regard to evaluation subcriteria is that each subcriterion need not be disclosed in the RFP, so long as the RFP informs offerors of the basic criteria, and any subcriteria used by the agency in the actual evaluation are merely "definitive of" the basic criteria. Genasys Corporation, 56 Comp. Gen. 835, 840 (1977), 77-2 CPD 60. Stated another way, "There is generally no requirement for an agency to list subcriteria when they are reasonably related to or encompassed by the main evaluation criterion." North American Telephone Association, B-187239, December 15, 1976, 76-2 CPD 495. In Genasys, for example, where one of the RFP's basic criteria was

"related corporate experience" in a procurement of an accounting system to be implemented via a telecommunications network, it was not improper for the agency to apply undisclosed subcriteria of "telecommunications experience" and "Federal Government accounting experience."

The present procurement is for technical assistance in the development, testing and drafting of several Forest Service Manual sections. We believe the RFP's General Specifications indicate that legal considerations are pertinent to the work. For example, the contractor is to provide assistance in connection with a manual section dealing with the Resources Planning Act, and with another section treating generally the authorities for (as well as other aspects of) Forest Service land management planning. Further, the contractor will be provided with a set of draft regulations pertaining to section "G" of the National Forest Management Act, and must document the cross-references between this material and the manual material drafted under the contract.

In view of the foregoing, we believe that legal background may be reasonably related to several of the RFP technical evaluation criteria. Nor do we interpret the Forest Service's above-quoted statement to mean, as the protester intimates, that the agency concedes that legal background was or became the paramount consideration in the technical evaluation. The agency's statement was made in response to the protester's allegation that CNA's personnel were not as well qualified as INTASA's because their background was legal. In our view, the agency's statement simply reaffirms that legal background was a very important aspect of offeror experience, given the nature of the RFP requirements. For reasons already noted, weighing the experience of the various offerors is the function of the Forest Service technical evaluators, and the fact that the protester would have conducted the evaluation differently does not show that the agency's evaluation had no reasonable basis.

VJ. Conduct of Discussions

The protester maintains that instead of "negotiations" the Forest Service merely sent a letter to all offerors requesting "clarifications." Also, INTASA states that it should not have had to respond to the request because its initial proposal adequately addressed all questions.

The Forest Service's March 24, 1978, letter to the offerors raised several questions as to staffing, advised the offerors how to compute their travel and per diem costs, and requested best and final offers. The agency maintains that such requests for clarifications "of a substantial nature" are negotiations. Also, the Forest Service states that the contracting officer told INTASA award could not be made to it on the basis of its initial proposal because its price was considered to be too high.

An agency's request for and receipt of "clarifications" which involve material changes in offerors' proposals constitute discussions. See New Hampshire-Vermont Health Service, 57 Comp. Gen. 347, 353 (1978), 78-1 CPD 202. The terms "discussions" and "negotiations" are usually regarded as synonymous. See Rantec Division, Emerson Electric Co., B-185764, June 4, 1976, 76-1 CPD 360. While discussions must be meaningful, their scope and extent is a matter primarily for determination by the contracting agency, whose judgment will not be disturbed by our Office unless clearly shown to have no reasonable basis. INTASA's general objections in this case furnish no grounds for a conclusion that meaningful discussions or negotiations were not conducted. See Joseph Legat Architects, *supra*.

Further, INTASA's objection that it should not have had to submit any clarifications is untimely. Under section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1978), protests must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. If an offeror believes the agency is unreasonably

requiring it to submit additional data and is unable to resolve the matter during discussions, it is on constructive notice of its basis for protest if the agency has not acceded to its position by the closing date for receipt of best and final offers. Joseph Legat Architects, supra, 77-2 CPD 458, at p. 21.

VII. Revised Technical Scores

INTASA repeatedly states that it is unable to understand how the Forest Service arrived at the technical scores of the INTASA and CNA best and final offers. (In the final evaluation, CNA's score increased from 51.8 to 56.6, and INTASA's from 55.4 to 56.4.) The protester states in its July 11, 1978, letter to our Office that in the absence of evidence to support these changes,

"* * * [W]e can only assume that either the review committee had information on cost as the Contracting Officer revealed to INTASA on April 17, or one of the committee members raised his score for CNA sufficiently to ensure that the firm would win on a combination of highest technical score - lowest price."

INTASA suspects that one of the technical evaluators (whom it does not identify) was consistently biased in favor of CNA, and makes the very serious allegation that "Based on the evidence, we submit that the procurement process was not competitive and that it was 'wired' in CNA's favor."

The Forest Service's June 23, 1978, report states that the best and final offers were evaluated by the technical evaluation panel independently from the price proposals, which were evaluated by the contracting officer. Also, the report states that in the initial evaluation only one price proposal (that of Consumer Dynamics, Inc.) had been discussed with the technical evaluators. More generally, the Forest

Service states that the proposals were evaluated by five highly competent technical evaluators, that the scores given to proposals were the result of the evaluators' judgment regarding the technical merits of the proposals in light of the evaluation criteria, and that their individual and collective judgments are documented in the record.

Allegations very similar to INTASA's were raised in Joseph Legat Architects, supra. Specifically, the protester in that case alleged that the technical scoring of best and final offers was manipulated in that the successful offeror's proposal received additional points which were not warranted by the changes in the proposal. Our decision stated (77-2 CPD 458 at page 27):

"In this regard, we believe the Army's position is simply that the evaluators considered [the successful offeror's] revised technical proposal and decided, in the exercise of their judgment, to accord it additional points in certain areas. While we have examined the record of the evaluators' numerical point scoring and [the successful offeror's] revised proposal drawings * * * it is not, as already indicated, our function either to evaluate the changes in [the] proposal or to decide what, if any, additional points should have been assigned. These are functions of the Army's technical evaluators, and we cannot say based upon the record that the assignment of the additional points * * * clearly has no reasonable basis."

Having examined the record in the present case, we believe that what we said in Joseph Legat Architects applies here as well. As also pointed out at length in Joseph Legat Architects, where, as here, the written record

does not clearly demonstrate the existence of unfair or improper conduct on the part of agency officials, a protester's allegations in this respect are properly to be regarded as wholly speculative and conjectural. 77-2 CPD 458 at pp. 39-42.

VIII. Price Evaluation

The protester states that, in light of the cost or pricing data submitted with CNA's proposal, it does not understand how CNA could propose 4,320 man-hours of effort at the cost indicated. INTASA analyzes at some length the salaries, general and administrative (G&A) expenses and other CNA cost elements. In general, INTASA questions whether certain cost elements involved in performing the contract work have been included in CNA's price, and contends that other elements, such as G&A, appear to be low.

The proposals in this procurement were submitted, and the contract award was made, on a firm-fixed-price basis. The RFP required offerors to submit "cost or pricing data" and indicated that cost analysis would be performed. However, the Forest Service states that it did not find it necessary to discuss price with the seven offerors in the competitive range. Also, the Forest Service indicates that the contracting officer conducted price analysis by comparing the prices offered by the offerors, that he considered CNA's best and final price to be reasonable, and that he determined CNA to be a responsible prospective contractor. We believe it is reasonably clear from the agency's report that the contracting officer was satisfied that an adequate degree of price competition had been generated in the procurement.

Under FPR § 1-3.807-3(a) (2d ed., FPI amend. 190, March 1978) submission and certification of cost or pricing data is required prior to the award of any negotiated contract expected to exceed \$100,000. However, FPR § 1-3.807-3(b) states that this requirement

may be waived where the contracting officer determines in writing that the price negotiated is based upon adequate price competition. While FPR § 1-3.807-2(a) (2d ed., FPR amend. 103, March 1972) states that cost analysis shall be performed when cost or pricing data is required to be submitted, it also indicates that whether cost analysis or price analysis is to be performed is dependent on the facts surrounding the particular procurement and the pricing situation. Under FPR § 1-3.807-2(b), price analysis, which is the process of evaluating prices without evaluating their separate cost elements, may be accomplished in various ways, including a comparison of the offered prices.

In light of the facts in the present procurement, we see nothing objectionable in the Forest Service's relying on price analysis and comparing the offerors' prices to determine price reasonableness, even though the RFP had required submission of cost or pricing data and stated that cost analysis would be performed. If the price negotiated is based on adequate price competition, the agency is no longer required to conduct cost analysis of the cost or pricing data submitted with the proposals. See, in this regard, 49 Comp. Gen. 295 (1969).

In addition, even where a firm-fixed-price proposal is subjected to cost analysis, the Government believes there is a risk the price may be unrealistically low, and there are allegations of a possible "buy-in," the Government is not necessarily required to reject the proposal. Cf. EPSCO, Incorporated, supra, and 50 Comp. Gen. 788 (1971). Further, insofar as the question of unreasonably low price relates to an offeror's responsibility, our Office does not review affirmative determinations of responsibility unless there is a showing of fraud or an alleged misapplication of definitive responsibility criteria, neither of which is involved here. See H. Webb Hayes & Associates, B-191259, May 1, 1978, 78-1 CPD 336, and decisions cited therein.

For the foregoing reasons, the questions raised by INTASA concerning CNA's price proposal furnish no basis for objection to the Forest Service's evaluation of CNA's price.

IX. Conclusion

The protest is denied.

you *Wilton J. Azola*
Comptroller General
of the United States